United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7538

United States Court of Appeals
FOR THE SECOND CIRCUIT

ALAN L. SPIELMAN,

Plaintiff-Appellant,

-against-

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WILLIAM F. DOWNEY, WESTON E. HAMILTON, WILLIAM P. HOWE, JR., J. ELROY MCCAW, EDWIN C. MCDONALD, LESLIE W. SCOTT, ALLEN & COMPANY, INCORPORATED, ALLEN & COMPANY, KLEINER, BELL & COMPANY, INCORPORATED, SEYMOUR M. LAZAR, EUGENE V. KLEIN, ALLEN MANUS, CECIL MANUS AND GREAT AMERICAN INSURANCE COMPANY,

Defendants,

GENERAL HOST CORPORATION, RICHARD C. PISTELL, HARRIS J. ASHTON, C. WHITCOMB ALDEN, JR., JOSEPH P. BINNS, WESTON E. HAMILTON, LESLIE W. SCOTT, ALLEN & COMPANY, INCORPORATED, AND ALLEN & COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-7538

ALAN L. SPIELMAN,
Plaintiff-Appellant,

-against-

GENERAL HOST CORPORATION, et al.
Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Plaintiff-Appellant, Alan L. Spielman, appeals from a final judgment entered in the United States District Court for the Southern District of New York, on August 27, 1975, after a four day trial before the Honorable Edward Weinfeld, United States District Judge, sitting without a jury.

On February 6, 1973 plaintiff filed a complaint on behalf of himself and a class consisting of holders of common stock and of convertible debentures of Armour & Company ("Armour") who tendered such securities to defendant-appellee General Host Corporation ("Host") for Host debentures and warrants pursuant to an Exchange Offer Prospectus ("prospectus").* The complaint, later amended on June 29, 1973, charged numerous violations of the securities laws,

*Plaintiff also brought action on behalf of a subclass consisting of: "Those persons or entities who purchased Armour securities between July 29, 1968 and February 14, 1969 and held them without tendering them to either General Host or Greyhound."

Plaintiff has not appealed a finding by Judge Weinfeld dismissing the case as to this class. (402 F. Supp. 190, 192 n.2)

including a charge that the prospectus was materially false and misleading in violation of Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§78j(b) and 78n(e), and Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a). The action was brought to recover damages and named as defendants Host, certain of its officers and directors, its co-dealer-managers, and a partnership connected with one of its co-dealer-managers.

The complaint contained many different allegations most of which are not relevant here. Judge Weinfeld explained:

> "While the amended complaint contains many free-wheeling allegations of conspiracy and fraudulent conduct, at the trial the claims were narrowed to the two basic issues indicated: the adequacy of disclosure in the General Host prospectus disseminated to Armour shareholders concerning General Host's ability to meet its debt obligations from internal cash flow and impediments to its ability to obtain effective operating control of Armour." (402 F. Supp. at 194)

These two issues—hereinafter denominated "The Prospects of Control Issue" and "The Cash Flow Issue"—are before this Court on appeal.

Some of the persons named as defendants in the complaint were never served and others were voluntarily dismissed by the plaintiff without payment of damages. Only nine defendants ultimately went to trial.

At the close of the trial, the Court dismissed the claim against defendant Allen & Company ("Allen Co.") (JA 525).* On August 14, 1975, the Court rendered a decision dismissing plaintiff's claims on the merits against the other defendants. Judge Weinfeld's opinion (402 F. Supp.

*All references designated "JA" are to the Joint Appendix. Documents not in the Joint Appendix but in the record on appeal will be separately described. Exhibits in evidence at trial are also noted in brackets by "Ex." followed by the appropriate exhibit number. Defendants' exhibit numbers are preceded by the letter "A" (*e.g.*, [Ex. A-32]). All other exhibits were offered by plaintiff.

190 (S.D.N.Y. 1975); JA 699-749) and the facts stipulated by the parties (JA 648-62) constitute the Court's findings of fact and conclusions of law (402 F. Supp. at 206). A judgment was entered on August 27, 1975 (JA 750-53). On September 23, 1975 plaintiff filed a notice of appeal (JA 754-55).

The Issues

A. Was Judge Weinfeld clearly in error in finding on "the prospects of control" issue:

1. that the Host prospectus did not imply that after the exchange offer Host would have immediate operating control of Armour (402 F. Supp. at 199-200);

2. that the prospectus clearly described the two impediments to Host taking operating control of Armour (i.e., the staggered board and cumulative voting), with reasonable emphasis, in the most logical place for such information (402 F. Supp. at 200-04); and

3. that the prospectus properly included pro forma financial statements, which fully set forth the assumptions on which they were based, because the SEC required their inclusion (402 F. Supp. at 204-05)?

B. Was Judge Weinfeld clearly in error in finding on "the cash flow" issue:

1. that the Host prospectus neither said nor implied that Host intended to meet its future obligations solely from its earnings, either historical or projected (402 F. Supp. at 195-96);

2. that the prospectus expressly stated that Host had a number of sources other than cash flow from operations (e.g., selling its own assets, the issuance of additional equity, and borrowing) to which Host might resort for cash to meet its obligations (402 F. Supp. at 195);

3. that at the time of the exchange offer, these alternative sources of funds were, in fact, available to Host (402 F. Supp. at 197); and

4. that the prospectus did not imply or represent that immediately after the exchange offer Host would be able to control Armour's dividend policy or dispose of Armour's assets, but instead properly suggested that these were possible future steps which Host *might* find it necessary or desirable to propose or, when it had operating control, to put into effect (402 F. Supp. at 199, 202-03)?

C. Was Judge Weinfeld clearly in error in finding that Armour shareholders had actual or presumed (i.e., constructive) knowledge of the matters plaintiff claims should have been brought to their attention?

D. Was Judge Weinfeld clearly in error in finding that the "total mix" of data available to Armour shareholders rendered harmless any conceivable defect in the prospectus?

E. Has plaintiff met his burden of showing that the good faith judgments made by defendants about how to disclose and what to emphasize in the prospectus were made with "willful, deliberate or reckless disregard for the truth"?

F. Was Judge Weinfeld clearly in error in finding that Allen Co. had nothing to do with the exchange offer and no "control" over Allen & Company Incorporated ("Allen Inc.")?

Statement of Facts

The Parties

In late 1968 Armour was a Chicago-based meat packer whose stock was traded on the New York Stock Exchange (JA 364).

In the same period Host was a New York based corporation in the business of manufacturing and selling baked goods, operating a chain of convenience stores, and operating service and recreational facilities in national parks. Its stock was also traded on the New York Stock Exchange (JA 320). Ashton was Host's president (JA 848).

Allen Inc. was an investment banking firm in New York. It had acted as an underwriter of Host's securities and in the fall of 1968 had acted as Host's investment banker in connection with a private placement of Host debentures (JA 653). Allen Inc. was connected with Allen Co., a limited partnership (JA 649-53) (see Point IVB, *infra*). Unlike Allen Inc., Allen Co. had never acted as an underwriter or investment banker for Host (JA 525, 652).

The other defendants who went to trial were all directors of Host.

Background of the Exchange Offer

In December 1968, Host owned 1,002,500 shares, or approximately 16.5%, of the common stock of Armour outstanding (JA 394-95, 655). Armour's management had already publicly announced its hostility to any attempt by Host to take over Armour and had begun to mobilize its defenses (JA 656-57).

On December 13, 1968, Host filed a Schedule 13D with the SEC reporting that it was considering the possibility of obtaining control of Armour through an exchange offer for additional Armour securities (JA 656) and publicly announced the same fact (JA 632).

On December 16, 1968, Host's board of directors authorized the calling of a special meeting of shareholders to approve an exchange offer and to authorize the issuance of the securities which Host would offer (JA 393-94). The same day a preliminary proxy statement for the special shareholders meeting was filed with the SEC (JA 396). On December 27, 1968 the proxy statement was mailed after review and clearance by the SEC to Host shareholders for a January 20, 1969 meeting (JA 396, 657).

Meanwhile, on December 23, 1968, following consultation with defendants Allen Inc. and Kleiner, Bell & Company Incorporated, Host's co-dealer-managers, Host announced the exchange offer subject to approval of its shareholders. (JA 116-17, 394, 397, 652, 653, 1406 [Ex. A-49], 922 [Ex. A-15(1)]). On December 30, 1968, the registration state-

ment relating to the securities to be issued in the exchange offer was filed with the SEC (JA 658).

Host's registration statement, as amended, covered $347,040,000 of Host debentures and 14,460,000 warrants to purchase Host common stock. The offering was made to holders of Armour common stock and 4½% convertible debentures. Host offered for each Armour share a 7% $60 debenture and warrants to purchase 2½ shares of Host at $40 per share (JA 658-59, 820 [Ex. 23]).

The offer provided that Host would not accept any tender of Armour securities unless upon acceptance of all tendered securities it would own more than 50% of the then outstanding Armour stock, assuming conversion of all Armour 4½% debentures tendered (JA 820 [Ex. 23]).

Under the prospectus and dealer-manager agreement, Allen Inc. was to use its best efforts to cause securities dealers to solicit tenders of Armour securities from their customers (JA 1406 [Ex. A-49]). The dealer-manager agreement contained representations and warranties of Host to Allen Inc. and Kleiner, Bell as to the sufficiency of the registration statement and prospectus (JA 1406-7 [Ex. A-49]) and the requirement that Host's accountants, Price Waterhouse & Co., deliver to Host, Allen Inc. and Kleiner, Bell a "cold comfort" certification (JA 1413 [Ex. A-50]).

On January 27, 1969, three days before Host's offer became effective, a subsidiary of the Greyhound Corporation made a competing tender offer to Armour shareholders to purchase 2,500,000 shares for $65 per share in cash (JA 660, 1098 [Ex. A-35]). On January 30, 1969, Greyhound increased its offer to $70 per share (JA 1418 [Ex. A-55]); ultimately Greyhound increased its offer to $72 per share (JA 1445 [Ex. A-67]). Greyhound's offer terminated on February 13, 1969.

Host's offer was declared effective by the full Commission of the SEC on January 30, 1969 (JA 659, 1415 [Ex. A-51]), and terminated February 14, 1969 (JA 659-60).

The Prospectus

The prospectus (JA 820 [Ex. 23]) contained pro forma (unaudited) combined statements of income showing that if Host succeeded in obtaining only 51% or 60% ownership of Armour as a result of its offer, Host would have had a net loss in fiscal 1968 on a pro forma basis (JA 833 [Ex. 23]). This information was included because it was required by SEC administrative practice at the time (JA 472).

No table disclosing Host's cash flow position on either a projected or historical pro forma basis was included in the prospectus (JA 473). It is undisputed in the record that any cash flow projections would have been prohibited by the SEC (JA 473-74, 714).

The prospectus also explicitly disclosed that Armour had a staggered board and cumulative voting:

> "To the best knowledge of [Host], there are presently 17 directors of Armour. The terms of 6 directors expire in 1969, 5 in 1970 and 6 in 1971. In addition, Armour has cumulative voting". (JA 872 [Ex. 23, Annex A, p. A-9])

The prospectus specifically directed the reader to refer to the Annex in which this language was contained under the heading "Information Concerning Armour":

> "See Annex A to this Prospectus for information concerning Armour and the financial statements of Armour". (JA 829 [Ex. 23, p. 10])

The competing Greyhound offer, and continuous criticism by Armour in various legal forums and in the press on Host's ability to finance an impasse in the event it was not able to assume immediate operating control, resulted, after discussions with the SEC, in the addition of language to the prospectus prior to the effective date (JA 465-66). In this added language, Armour's shareholders were warned:

> "General Host may find it desirable upon consummation of the Exchange Offer to propose to stock-

> holders of the relevant corporations a merger or consolidation of it or its present or future subsidiaries with Armour or certain of its subsidiaries, or General Host may find it desirable to dispose of portions of the assets presently held by it or by Armour. If no such merger or consolidation occurs, and if General Host has not acquired more than 80% of Armour's Common Stock, which would allow it to enter into tax-saving arrangements, General Host may find it necessary or desirable to increase the dividend paid on common stock by Armour, or to incur new indebtedness or issue additional equity securities" (JA 828 [Ex. 23, p. 9]).

The quoted language represents a carefully considered distillation prepared by Host's attorneys and accountants, after discussions with the staff of the SEC.

With reference to the action by the Justice Department to enjoin Host's exchange offer on the ground that control by Host of Armour would violate a 1920 consent decree by the nation's meat packers in an antitrust case (JA 774 [Ex. 21(C)]), the prospectus contained a warning that Host might be forced to sell its Armour stock even though it prevailed in the District Court:

> "[I]f any Department of Justice appeal is successful or if the Department were to succeed in some other action, [Host] may find it necessary or desirable to dispose of all or a part of its currently operating businesses or all or a part of its stock in Armour". (JA 828 [Ex. 23, p. 9]).

Host also disclosed to Armour shareholders that Armour had opposed the tender offer and had filed an action in the United States District Court for the Southern District of New York, which charged:

> "[Host], its Directors and financial officers and the Dealer Managers with various conspiracies and acts in violation of the securities laws and [sought] to enjoin the making and consummation of this Exchange Offer" (JA 827 [Ex. 23, p. 8]).

Host further disclosed that Armour had obtained a temporary order from the Illinois Securities Commissioner restraining the Exchange Offer in that state "because of an alleged lack of soundness of the Exchange Offer" (JA 828 [Ex. 23, p. 9]).

Prospects of Control

Host would accept tendered shares only if sufficient shares were tendered to give it a majority of Armour's outstanding stock (JA 820, 822 [Ex. 23, pp. 1 and 3]). Once it obtained a majority of Armour's voting stock, it was inevitable that Host would take control of Armour's board (JA 414-15). At most, this required that Host vote its shares at three annual meetings to elect a majority of each of the three classes of directors into which Armour's board was divided (JA 415). Armour had already scheduled the first of these annual meetings for February 21, 1969 (JA 1089 [Ex. A-29]). Since the first of the required three annual meetings took place soon after the exchange offer, Host required a maximum of approximately two years after the offer to obtain a majority of Armour's directors (JA 415).

Although it might take two years to obtain control of the board, Host's management had a reasonable basis for believing that it would not, in fact, have to wait that long (JA 737). In the first place, Host's management expected that some incumbent directors might resign rather than cling to their positions in the face of opposition from a majority shareholder (JA 107-08, 268-71, 738). A second possibility was that some incumbent directors might be won over to vote with Host nominees despite their opposition during the period when Host was only a 16.5% shareholder (JA 415-18, 737-38). A third possibility was that unreasonable opposition to a shareholder majority by a director in breach of his fiduciary responsibility could lead to removal "with" or "without" cause.

A fourth and clearly viable route to control at an early date lay in the prospect of amending Armour's by-laws to

increase the size of the board (JA 416, 447-57, 738; see p. 23 *infra*).

Host's Ability to Service Debt

Host's projected earnings from operations, bolstered by Armour's current dividend, were sufficient to provide the cash necessary for the interest payments on Host's 7% debentures (JA 419-20, 482). However, the prospectus made no representation either that Host would service the debt out of earnings, either historical or projected, or that it could do so (JA 489-91, 714).

Host had other options available to acquire financing, if necessary, in the form of selling portions of its own assets, the issuance of additional equity, and, most significant and probable, borrowing (JA 427-28). Host had obtained a $20 million loan commitment in the fall of 1968, $6 million of which remained unused (JA 425). Host had also received an opinion from Allen Co. that Host could obtain refinancing of a $9.4 million indebtedness due in August 1969 (JA 428, 525). Thus, in the money market of January 1969, even if Host had to borrow additional moneys to carry itself over until it obtained control of Armour's board, there was no reason to doubt that it could do so (JA 429, 507-13).

Review by the SEC

The basic documents in connection with Host's exchange offer—the registration statement, amendments Nos. 1 and 2, and the prospectus— were reviewed by the SEC (JA 482, 658-59, 924 [Ex. A-18], 1422 [Ex. 56], 1329 [Ex. A-46], 1422 [Ex. 56], 1447 [Ex. A-89], 820 [Ex. 23], 1415 [Ex. A-51]). The Commission itself accelerated the effective date of Host's registration statement. Thus both the SEC staff and the full Commission reviewed the language of which plaintiff now complains (JA 482, 659, 719, 1415 [Ex. A-51]).

Normally, the Commission's staff would have passed on this prospectus. But it is understandable that in this case the Commission itself took the unusual step of passing on

the prospectus (JA 659) because the Commission and its staff were inundated with letters and memoranda from Armour's law firms criticizing the Host exchange offer. On this point, Judge Weinfeld stated below:

> "While the registration of securities by the SEC does not constitute Commission approval of the language of the prospectus [citation omitted] and cannot relieve this Court of its duty to exercise an independent judgment on the adequacy of disclosure, clearance by the Commission in the face of charges identical with those presented here may be given some weight, [citations omitted] and the documentary evidence of arguments pressed by Armour's counsel upon the Commission makes this a particularly appropriate case in which to give some credit to the Commission's clearance." (402 F. Supp. at 197).

Armour's counsel, Sullivan & Cromwell, wrote letters and memoranda to the SEC on January 2, 1969, January 6, 1969, January 24, 1969, February 6, 1969 and February 7, 1969 (JA 1071 [Ex. A-21], 1082 [Ex. A-22], 1096 [Ex. A-34], 1424 [Ex. A-58], and 1432 [Ex. A-60], respectively). Kirkland, Ellis, Hodson, Chaffetz & Masters of Chicago, also counsel for Armour, communicated with the SEC on December 10, 1968, December 16, 1968, January 6, 1969 and January 23, 1969 (JA 915 [Ex. A-11], 919 [Ex. A-13], 1083 [Ex. A-23], and 1095 [Ex. A-32], respectively). Thus, the SEC's intensive investigation of Host's prospectus was facilitated by well-informed advocates bent on blocking the Host offer.

Armour's Attempt to Obtain an Injunction from the District Court

On January 23, 1969 before the Host registration statement became effective (JA 1415 [Ex. A-51]), Armour commenced an action in the District Court and obtained a hearing on February 5, 1969 before Judge Weinfeld, as the motion judge, seeking a preliminary injunction against the Host exchange offer (JA 1106 [Ex. A-42(A)]).

Armour contended that the Host registration statement was deficient in not indicating, among other matters, the "unlikelihood" that Host would be able to pay principal and interest on the Host debentures (JA 705, 1315 [Ex. A-42(C)]). After a hearing, Armour's motion for a preliminary injunction was denied. The opinion is reported at 296 F. Supp. 470 (S.D.N.Y. 1969).

Armour's Communications to its Stockholders

Prior to and throughout the Host offer, Armour deluged Armour stockholders with mailings, newspaper advertisements and public announcements pointing up alleged deficiencies of the Host offer in an effort to defeat it. This material going to both the prospects of control and cash flow issues, is described in Points IIA and IIB, *infra*.

The Results of the Offer

Upon completion of the Host and Greyhound offers, Host owned approximately 55% of Armour shares, and Greyhound 32% (JA 661, 662). At the Armour annual meeting shortly after the Host offer terminated, Host elected to Armour's 17-man board four of the six directors then up for election. There followed a long series of negotiations between Greyhound and Host. These negotiations and the terms and motivations for Host's eventual sale of the Armour interest to Greyhound are not part of the trial record and are not relevant on this appeal.*

*Plaintiff's brief (pp. 22-24) purports, without any citation to the record, to summarize these events. This is improper since they are not part of the trial record. The issue before Judge Weinfeld and this Court is what could reasonable draftsmen have foreseen in January, 1969. What actually happened after the exchange offer is irrelevant. This Court should confine its review, as did the Trial Court (see, e.g., JA 127-28, 231, 433), to facts available to the defendants at the time of the exchange offer. Moreover, plaintiff's summary of what happened is inaccurate. For example, Host did in fact obtain operating control of Armour in less than two years, on May 7, 1970, by expanding Armour's board of directors (JA 416, 444-45). For reasons wholly irrelevant here, however, Host thereafter sold its interest in Armour to Greyhound.

SUMMARY OF ARGUMENT

Judge Weinfeld meticulously evaluated the adequacy of disclosure in the prospectus. He found that the material facts were properly set forth both as to the impediments to Host's obtaining immediate operating control of Armour and as to Host's ability to obtain sufficient cash to service its debt. In addition, he found that Armour's stockholders, to whom the prospectus was addressed, actually and constructively knew about Armour's staggered board and cumulative voting, the two impediments to Host's gaining immediate operating control of Armour. Finally, he concluded that the "total mix" of communications from Host and from Armour presented an accurate picture of all there was to tell.

Defendants submit that this Court must affirm Judge Weinfeld's findings unless he committed clear error in holding: (a) that the prospectus was accurate, (b) that Armour stockholders had actual or constructive knowledge about the control and cash flow issues, and (c) that the "total mix" of data available to the Armour stockholders rendered harmless any conceivable fault in the prospectus.

The prospectus was drafted by skilled lawyers, accountants and businessmen acting in good faith. There is no hint in the record that they acted "willfully, deliberately or with reckless disregard for the truth." Therefore, under well-settled precedents in this Circuit, civil liability for damages cannot be imposed.*

*Plaintiff's claim under Sections 10(b) and 14(e) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78n(e), and Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), will be treated together in this brief since, as to the key elements of "materiality" and "scienter", the legal standards under each statutory provision are the same. See, e.g., Lanza v. Drexel & Co., 479 F.2d 1277, 1299, n.65 (2d Cir. 1973); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 362-64 (2d Cir.), cert. denied, 414 U.S. 910 (1973) ("Chris-Craft II"); 2 A. Bromberg, Securities Law: Fraud § 8.4 (330), at 204.23-.25 (1973). It should be noted, however, that two district judges in this Circuit have recently held that "§ 17(a) does not provide for a private right of action." Architectural League v.

Judge Weinfeld was also correct in dismissing Allen Co. since it was not involved in this offering.

This is a case which should never have been brought. Armour's lawyers in 1969 argued unsuccessfully before the SEC and Judge Weinfeld many of the same points which were before Judge Weinfeld on the trial. The evidence and the findings of the Trial Court leave no room for doubt about the overall adequacy of the disclosure or of defendants' use of reasonable care.

POINT I

The Trial Court's Factual Findings Were Not "Clearly Erroneous" And Must Be Upheld.

Judge Weinfeld found that Armour's shareholders received adequate disclosure, and that no material fact was misrepresented or omitted from the prospectus. The record contains no evidence of the requisite *scienter*, and Judge Weinfeld implicitly so found. These were each findings of fact.*

The "clearly erroneous" rule applies to inferences of fact made by a trial judge from the evidentiary facts. See, *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948); Fed. R. Civ. P. 52(a). Appellate courts will not substitute their judgment for that of a trial judge simply because reasonable men might draw different inferences, especially when the findings relate to matters such as motive and intent. *See United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949); *Stoody Company* v. *Royer*,

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Bartos, CCH Fed. Sec. L. Rep. ¶95,329, at 98.654 (S.D.N.Y. 1975); Welch Foods, Inc. v. Goldman, Sachs & Co., CCH Fed. Sec. L. Rep. ¶94,806, at 96,685-87 (S.D.N.Y. 1974). Compare Blue Chips Stamps v. Manor Drug Stores, 421 U.S. 723, 733 n.6 (1975) with Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1283 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970).

*Lanza v. Drexel & Co., 479 F.2d 1277, 1280-81 (2d Cir. 1973) (scienter); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 888 (2d Cir. 1972) (materiality); Britt v. Cyril Bath Co., 417 F.2d 433, 437 (6th Cir. 1969) (materiality); Kasner v. H. Hentz & Co., 475 F.2d 119, 121 (5th Cir. 1973) (materiality and misrepresentation).

374 F.2d 672, 678 (10th Cir. 1967); *Federal Security Insurance Co.* v. *Smith*, 259 F.2d 294, 295 (10th Cir. 1958).

Plaintiff's contention (pp. 5, 25)* that this Court is not bound by Judge Weinfeld's factual findings is simply incorrect. This case is not based as plaintiff asserts (p. 5) solely on "stipulated or uncontested facts." Judge Weinfeld had the opportunity at the trial to hear and evaluate the witnesses. He saw three officers of Host—Ashton, Day and Glynn—and Arthur Bettauer of Price, Waterhouse & Co. subjected to cross-examination on issues of operating control (JA 416-18, 477-79, 107-08, 151-56, 218-20) and cash flow (JA 235, 420-28, 487, 491, 237-38, 485-494, 431-40, 171-173, 199-201, 259-260). For example, Ashton was confronted with plaintiff's contention that the affidavit he had filed in the Justice Department antitrust lawsuit (the "Ashton Affidavit") was inconsistent with the prospectus. After hearing Ashton's response (JA 414-15), Judge Weinfeld found that it was not inconsistent:

> "The affidavit does not support plaintiff's theory that General Host believed control was necessarily a long way off, but is instead directed to General Host's claim that no irreparable injury to the government will result from the exchange offer itself and therefore preliminary injunctive relief was not warranted—in sum, that even if the exchange offer were successful, and thereupon General Host moved forward to obtain operating control, ample time still remained for the government, based on the changed situation, to re-apply for injunctive relief." (402 F. Supp. at 202)

(see also discussion at pp. 21-22 *infra*).

Judge Weinfeld was also the judge charged with contemporaneous review of the Host offer in the injunction hearing. This made him uniquely qualified to appreciate the need, if any, in 1969 for additional disclosures and emphasis. His perspective cannot be duplicated by this Court.

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* References to plaintiff's contentions on this appeal are designated by reference to the relevant page of his main brief.

POINT II

Abundant Evidence Supports Judge Weinfeld's Findings that Host's Prospectus Did Not Omit or Misrepresent a Material Fact.

After a painstaking evaluation of the evidence, Judge Weinfeld held:

> "[Host's prospectus] did not misrepresent or state in a misleading fashion, nor did it omit to disclose, any fact which *might or would* have been important to the decision of a reasonable investor with regard to the exchange offer." (402 F. Supp at 206; emphasis added.)

This holding renders academic any "would-might" distinctions as to materiality and is in accordance with well settled law. *See, e.g., Titan Group, Inc.* v. *Faggen,* 513 F.2d 234, 239 (2d Cir. 1975)*

Plaintiff does not challenge Judge Weinfeld's formulation of the standard of materiality but instead claims that he "erred" in applying the facts of this case to the law. The discussions in Points IIA and IIB below demonstrate that Judge Weinfeld's factual findings are abundantly supported by the evidence.

A. The Prospects of Control

(i) Disclosure in the Prospectus

Plaintiff contends that Judge Weinfeld erred in finding that the language at page 9 of Host's prospectus under the

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* Compare, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970) and Affiliated Ute Citizens v. United States, 406 U.S. 128, 153-54 (1972) (suggesting a "might attach importance" materiality standard) with Smallwood v. Pearl Brewing Co., 489 F.2d 579, 604 (5th Cir.), *cert. denied,* 419 U.S. 873 (1974); Chris-Craft II, 480 F.2d at 363; Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1302 (2d Cir. 1973); and SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied.* 394 U.S. 976 (1969) (adopting a "would attach importance" standard).

sub-title "Other Aspects of the Exchange Offer" did not omit or misrepresent a material fact. He contends this portion of the prospectus should have emphasized that some of the acts described could be accomplished only if Host controlled Armour's board of directors and that such control might not be obtained for two years (JA 372-73). Plaintiff conceded at trial, and Judge Weinfeld found, that there was no express misrepresentation to the effect that Host would have immediate operating control of Armour's board of directors as a result of obtaining a majority of its stock in the exchange offer (JA 373, 726). Judge Weinfeld accurately observed that:

> "Plaintiff's present claim that the obstacles of the staggered board and cumulative voting should have been highlighted stands in marked contrast to the relatively insignificant importance given this issue during the actual battle for control of Armour." (402 F. Supp. at 204; footnote omitted).

A reading of the prospectus shows the adequacy of disclosure. The text at page 9 of the prospectus (JA 820 [Ex. 23]) says that Host "intends to act promptly both before and after consummation of the Exchange Offer to obtain control of the board of directors and management of Armour". This language says that Host still has to do things *after* the exchange offer to get control, thus ruling out any representation that immediate control would ensue. The next sentence discloses that Host may engage in the solicitation of proxies for the election of directors, an act that would be unnecessary if the exchange offer were to result in immediate control. This sentence indicates that Host might solicit proxies both "at the February 21, 1969 annual meeting of Armour & Company *and otherwise*" (emphasis added). The italicized phrase says that solicitation at the then forthcoming annual meeting of Armour might be insufficient by itself and that further solicitations at subsequent Armour shareholders meetings might be required to obtain control.

In the succeeding paragraph, Host set forth certain possible future steps which it might find desirable to propose or put into effect. Some of these steps did require concurrence of Armour's board; others did not. But there is no representation or indication that control of the board would be immediate. Host indicated, as the first possibility, that it might find it desirable to propose to stockholders a merger or consolidation, or a disposition of assets held by it or by Armour.

While a merger or disposition of Armour's assets would require concurrence of Armour's board, there was no suggestion when, if at all, these proposals would be put to Armour's board or its shareholders. Host said no more than it "might . . . propose" these actions. Indeed, at the time the prospectus was written, no one could know whether the Supreme Court would finally uphold the Justice Department's position or Host's position in the Department's Chicago antitrust case, and this fundamental issue had to be resolved in order to know whether to go forward toward merger or backward toward divestiture of assets. Given the uncertain outcome of the Justice Department's law suit and that its resolution would take time, the language used could not have been read as an assertion that Host would make an immediate proposal either to merge or to dispose of assets. There first had to be a decision as to what course to follow; both would not be pursued.

In the next sentence the prospectus states if no merger or consolidation occurs, Host might find it necessary or desirable to take certain other steps, the first of which is to increase the dividend paid on Armour common stock. This statement was an appropriate caveat. That Host might want to increase Armour's dividend could have been material to an Armour shareholder faced with the necessity of determining whether to tender his shares or to continue to hold them. The prospect of an increased dividend could have influenced a decision to retain their securities, a decision against Host's interest. While a dividend increase

would require affirmative Armour board action, there is no suggestion in this sentence of when or whether such a dividend increase would take place.

The two remaining possibilities mentioned in the same sentence were for Host to incur new indebtedness or to issue additional equity securities. There is no claim that Host would have been required to control Armour's board in order to take these steps. All witnesses at the trial who testified on this subject said that in January, 1969, they considered it feasible for Host to borrow or to issue additional equity (JA 171-73, 237-43, 424-30, 482-85, 507-10).

Judge Weinfeld correctly summarized the accuracy of the prospectus as follows:

> "The prospectus does not represent, however, that upon successful completion of the exchange offer General Host would have *immediate operating control* of Armour. . . . The language used . . . indicates that after the exchange, further action by General Host was required to get control, thus negating any view that immediate control would be achieved upon acquiring more than 50% of Armour's stock." (402 F. Supp. at 199; emphasis in the original).

In addition to complaining of the language on page 9, plaintiff suggests (p. 29) that the inclusion of pro forma financial statements in the prospectus between pages 11 and 21 also implies that Host could gain immediate control of Armour. The pro formas do not imply that Host would have immediate operating control of Armour following the exchange offer. Moreover, the pro forma financial statements were included in the prospectus* because the SEC required their inclusion (JA 219, 472). Plaintiff introduced no evidence that the content of the pro forma financials was in any way incorrect. As the Trial Judge found:

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*See Instruction 12 to Form S-1 (17 C.F.R. §239.11 (1975)). Compare Rappaport, SEC Accounting Practice and Procedure 21-7 (3d ed. 1972).

> "the language of the prospectus introducing these pro formas clearly indicates that the statements were the result of combining the two companies' operations, and does not lend itself to plaintiff's interpretation that the statements created the 'impression' that upon consummation of the exchange offer, General Host would have Armour's assets and cash flow available to it." (402 F. Supp. at 205; footnote omitted).

In short, the Trial Judge correctly rejected plaintiff's argument:

> "Given the cautionary language that the exchange offer in and of itself would not deliver operating control of Armour to General Host and the absence of any affirmative misrepresentation to this effect, defendants cannot be held liable because of plaintiff's 'impressions' which are not fairly supported by the language of the prospectus." (402 F. Supp. at 205).

The legal impediments to obtaining immediate control, that is, the Armour staggered board and cumulative voting provisions, were clearly described on page A-9 of the prospectus (JA 1382). Indeed, the summary of the Armour Certificate of Incorporation containing such provisions was also set forth verbatim on page A-10 (JA 1383). While plaintiff complains about the physical location of these facts in the prospectus, this was the most logical place. The prospectus was divided into two parts. The first part dealt with the exchange offer and described Host. The second part was a 28-page "appendix" which set forth a complete description of Armour. The reader was directed to the appendix by a reference on page 10 of the prospectus, which reads:

> **"Information Concerning Armour**
>
> "See Annex A to this prospectus for information concerning Armour and the financial statements of Armour. . . ." (JA 829 [Ex. 23, p. 10]).

In the setting that existed prior to and during the exchange offer, none of the persons concerned with the creation of this prospectus believed that the obstacles to Host's obtaining immediate control required the emphasis that plaintiff now suggests. Armour's counsel's memorandum to the SEC (JA 1076 [Ex. A-21, p. 6]), its January 9, 1969 letter to its own shareholders (JA 1087 [Ex. A-26, p. 3]) and its newspaper advertisement of the same date (JA 1084 [Ex. A-25]) described the cumulative voting and staggered board provisions, but Armour did not emphasize these provisions. The SEC also had the opportunity to require further emphasis in the prospectus and did not request it. Armour's complaint in the injunction proceeding it brought at the time did not even mention the staggered board or cumulative voting (JA 1106 [Ex. A-42(A)]). The "failure of a target company to seize an opportunity to rectify claimed omissions may have some bearing on their materiality." *Sonesta International Hotels Corp* v. *Wellington Associates*, 483 F.2d 247, 255 (2d Cir. 1973) and cases cited therein; *cf. General Time Corp.* v. *Talley Industries Inc.*, 403 F.2d 159, 162-63 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969) (failure to object during proxy contest constitutes evidence of lack of materiality). Armour's management and attorneys had the greatest interest in pointing up the weaknesses of the Host offer (402 F. Supp. at 204). Armour's contemporaneous conduct is persuasive evidence of the perspective of the time.

By contrast, the issue of immediate control was significant in the Justice Department's antitrust suit. Correcting plaintiff's distortion of the Ashton Affidavit, Judge Weinfeld concluded:

> "Despite plaintiff's selective editing of various sentences in the Ashton affidavit, its tone and emphasis is consistent with the prospectus language, and this is unquestionably so when viewed in its proper context. The affidavit was submitted in opposition to a motion for *preliminary* injunctive relief. A fair reading of the entire affidavit reveals that General Host's argument to the District Court in

> Illinois was that the government's request for preliminary relief 'should be denied at this time as premature' because General Host's exchange offer to acquire a majority of Armour's stock may be unsuccessful; even if successful, it will not in and of itself give General Host operating control of Armour; and it will not effect a merger of the two companies, but rather will leave them separately engaged in their separate businesses. It emphasizes that 'until the result of the exchange offer is known' there would appear to be no question for the Court to decide and concludes by arguing that because various overt [illegible]ould have to occur before the assets of the [illegible]mpanies would be combined, 'no prejudice to the Government's position will occur by reason of General Host's exchange offer.' The affidavit does not support plaintiff's theory that General Host believed control was necessarily a long way off, but is instead directed to General Host's claim that no irreparable injury to the government will result from the exchange offer itself and therefore preliminary injunctive relief was not warranted—in sum, that even if the exchange offer were successful, and thereupon General Host moved forward to obtain operating control, ample time still remained for the government, based on the changed situation, to reapply for injunctive relief." (402 F. Supp. 202; emphasis in original).

Similarly, Judge Weinfeld explained that a distinction must necessarily be made between a controlling stock interest and control of the board (402 F. Supp. at 199). Plaintiff, failing to recognize this distinction, quotes and underscores the statement of Ashton that *"In fact, however, control of Armour by General Host is far from imminent and it may never occur"* (p. 13). The italicized statement is clearly a reflection by Mr. Ashton of the fact that Host's exchange offer, which had not yet been made, might be unsuccessful and Host might never acquire 51% of Armour stock.*

* Plaintiff also argues (p. 27) that the discussion of Armour's staggered board and cumulative voting contained in an internal study

There were obstacles to Host's gaining operating control of Armour, and there was the possibility that approximately two years could elapse after the offer before such control would be obtained. But this did not mean that Host expected to have to wait this long. Ashton testified that he believed that once Host had the control block of stock, the management members of Armour's board would want to go along with the majority shareholder because their "livelihood" depended on continued employment (JA 417-18), and some directors would cooperate with Host or resign (JA 460). He also testified that Armour's by-laws could be amended by shareholder vote to increase the number of directors in which case Host would elect most of the new directors (JA 416, 447-49). Ashton's view that the Armour board could be increased by vote of shareholders was confirmed both by Host's own attorneys (JA 448) and by Delaware counsel (JA 416, 418, 448, 1432 [Ex. A-61]).* Day, a Host Vice President, said that he

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of Armour prepared by Host in the fall of 1968 was inconsistent with the prospectus. However, the study does no more than analyze the vote necessary to elect varying numbers of directors. An Armour shareholder would do the same on the basis of the information contained in the prospectus. Judge Weinfeld properly found that the staggered board and cumulative voting were given no greater emphasis in the study (which discusses them in the last two of 126 pages (JA 815-16)) than in the prospectus itself (402 F. Supp. at 202-03).

* Further confirmation is provided by an analysis of a 1974 amendment to Section 109(a) of the Delaware Corporation Law which legislatively confirmed that shareholders have an inherent right to amend by-laws, and thus to increase the number of directors serving on a board. In their analysis of the amendment, S. Samuel Arsht and Lewis S. Black III, two members of the Corporation Law Committee of the Delaware State Bar Association, which drafts amendments to the State's Corporation Law, state:

> "The prevailing view, which this amendment reflects, is that the stockholders have inherent power to adopt or amend the by-laws and that the intent of Section 109(a) before its amendment was to permit a corporation to grant to its directors concurrent authority but not exclusive authority, to amend the by-laws." 2 Prentice-Hall, Corporation Current Statutes 375-76 (1974).

believed "it would probably not take a great deal of time" and that the board would be turned over relatively quickly to Host by resignation or a special stockholders meeting (JA 107-08). Herbert A. Allen, President of Allen Inc., testified that as a practical business matter he did not consider that the staggered board and cumulative voting constituted a substantial impediment to Host achieving control of the Armour board because Host would win over a majority once Host's representatives attended meetings or talked to board members personally. Mr. Allen believed that control would be achieved by negotiation once the exchange offer was complete. This was consistent with his recent experience in the take-over of Great American by National General (JA 261, 266, 268-70). Glynn, Host's Controller, testified that Host management understood that the ability to influence Armour's board would pass to Host upon obtaining 51% or more of the stock (JA 220) and that some people believed that 40% could be sufficient to obtain working control (JA 218).

The degree of emphasis given to the staggered board and cumulative voting in the prospectus accurately reflected the significance these points had to persons connected with the offer on both sides. The evidence demonstrated this and the Court so found (402 F. Supp. at 204).

Plaintiff (pp. 39-41) relies on *Mills* v. *Electric Autolite Co.*, 403 F.2d 429 (7th Cir. 1968), *vacated on other grounds*, 396 U.S. 375 (1970), and *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972), for the proposition that the prospectus should have "highlighted" and not "buried" the facts about the impediments to Host taking operating control. But a review of these cases demonstrates the inapplicability of any "buried fact" doctrine here.

In *Mills* v. *Electric Autolite Co.*, *supra* at 434, the Seventh Circuit held that language used in the proxy statement "implied that [Autolite's] board was giving disinterested advice" in recommending a merger with Mergenthaler

when, in fact, Autolite's board had been selected by Mergenthaler.

The differences between *Mills* and the instant case are striking: (a) the *Mills* proxy statement contained a misrepresentation as to the board's disinterested advice, while the Host prospectus included no misrepresentation; (b) the issue of disinterestedness in *Mills* was known to be a crucially significant fact, whereas the impediments to immediate control received reasonable emphasis in the prospectus in view of their less than crucial importance; (c) the minority stockholders of Autolite were not placed on their guard (*id.* at 433-34) but instead were left helplessly unaware, while Armour stockholders were clearly appraised of the possible legal impediments (i.e., the staggered board and cumulative voting) to Host's obtaining operating control in the most logical location for such information; and (d) the controlled Autolite directors would not correct the misleading representation conveyed by the Autolite proxy statement, while Armour's shareholders had Armour's management scrutinizing with hostile eyes the accuracy of everything Host said.

Similarly, in *Kohn* v. *American Metal Climax, Inc., supra,* where stockholders were sent "approximately 200 pages of highly complex and technical financial and legal data" (322 F. Supp. at 1343), some important facts were found buried and others were not. In holding "clearly erroneous" a district court finding that facts concerning conflicts of interest among directors had been buried, the Third Circuit set forth reasoning which is clearly relevant here:

> "The fact, relied upon by the district court, that the RST Board recommendation appears in boldfaced type whereas only part of the disclosures of conflicting interests so appears does not in our view, violate the equal prominence rule. *Nor is the rule violated because some of the interest disclosures were made only in the Appendices. Reasonable latitude in this area is important if nit-picking is not to become*

> *the name of the game.*" 458 F.2d at 267 (emphasis added).

As Judge Weinfeld, quoting from *Smallwood* v. *Pearl Brewing Co.*, 489 F.2d 579, 602 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974), said:

> "'[d]ifficult decisions must be made as to what information to place toward the beginning and what to place further toward the end [of the document], what to emphasize and what to state more blandly. It is, of course, impossible to emphasize everything, and every fact can not be contained in the beginning.' Exchange offerors must be fair to the needs of shareholders for relevant information, but courts cannot require that they be 'clairvoyant'." (402 F. Supp. at 205-06)

Host used reasonable discretion in disclosing the impediments to its obtaining operating control. The record fully supports Judge Weinfeld's conclusion that the use of such discretion must not be found wanting if the "making of exchange offers is not to degenerate into a game of 'Russian roulette.'" (402 F. Supp. at 206).

(ii) Knowledge of Armour Shareholders

In any event, the existence of Armour's staggered board and cumulative voting were well known to Armour shareholders. The prospectus, it must be remembered, was addressed to *Armour* shareholders. This affects the extent of disclosure required of Host concerning publicly available information. *See, eg., Titan Group, Inc.* v. *Faggen*, 513 F.2d 234, 238 (2d Cir. 1975); *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 873 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *SEC* v. *Coffey*, 493 F.2d 1304, 1313 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975); *City National Bank* v. *Vanderboom*, 422 F.2d 221, 231 (8th Cir.), *cert. denied*, 399 U.S. 905 (1970).

It can be assumed that the shareholders of a corporation know the basic facts about its structure. *Ash* v. *LFE Corp.*, CCH Fed. Sec. L. Rep. 95,352, at 98,757 (3d Cir.

1975); *Frigitemp Corp.* v. *Financial Dynamics Fund, Inc.*, CCH Fed. Sec. L. Rep. 95,323, at 98,636 (2d Cir. 1975); *Tcherepnin* v. *Franz*, 461 F.2d 544, 553 (7th Cir. 1972) ("The appellants must be deemed to have looked at [the corporation] in their dealings with it through lenses tinted with knowledge, whether actual or constructive"); *Hafner* v. *Forest Laboratories, Inc.*, 345 F.2d 167, 168 (2d Cir. 1965) (constructive knowledge of stock prices); *Morgan* v. *Koch*, 419 F.2d 993, 998 (7th Cir. 1969) (certificate of incorporation is constructively known); *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co.*, 356 F. Supp. 1066, 1071-72 (S.D.N.Y.), *aff'd*, 476 F.2d 687 (2d Cir. 1973) (claims of material omissions were rejected because "such facts would have been known to the ordinary investor in A&P either through the company's annual and quarterly statements or through papers of general circulation").

The record in this case overwhelmingly supports Judge Weinfeld's finding that:

> "Armour shareholders presumably were aware of their company's staggered board and cumulative voting, and the prospectus sufficiently disclosed this information in light of the circumstances existing at the time of the offer." (402 F. Supp. at 201)

(iii) The "Total Mix"

Finally in addition to disclosures in Host's prospectus as to what Armour's shareholders actually or constructively knew, Judge Weinfeld found that Armour shareholders were literally "inundated with information" from other sources "concerning their own corporation's staggered board and its cumulative voting provision" (402 F. Supp. at 201).

On January 17, 1969, Armour management sent a proxy statement to its shareholders of record as of January 2, 1969 for its February 21, 1969 annual meeting. This document stated:

> "Six directors are to be elected at this meeting, for terms of three years each. At the election each holder of record will have cumulative voting rights. . . ." (JA 1090 [Ex. A-29, p. 2]).

On January 9, 1969, Armour had stated in a letter that "Armour's Board of Directors... is classified and elected for three-year terms" (JA 1084 [Ex. A-25, p. 3], JA 1087 [Ex. A-26]). The parties stipulated that this letter was mailed to shareholders and reprinted in major newspapers, including The New York Times and the Wall Street Journal (JA 656-57). Then again on February 10, 1969, Armour sent a supplemental proxy statement to the stockholders. On the first and second pages of the four-page document, Armour made clear that its board was classified and elected by cumulative voting.

On the basis of these documents from sources other than Host, the existence of Armour's staggered board and cumulative voting were well known to Armour shareholders. The cases supporting the Trial Judge's conclusions as to the curative effect of these communications are discussed in Point IIC, *infra*.

(iv) Conclusion

Plaintiff (pp. 30-33) asserts that *Alaska Interstate Co.* v. *McMillian*, 402 F. Supp. 532 (D. Del. 1975), has "facts closely paralleling" the instant case and is "contrary to Judge Weinfeld's decision". But this assertion is wildly far from the mark. Indeed, *Alaska Interstate* militates strongly against his claim.

In *Alaska Interstate*, Alaska and Energy were both seeking control of Apco. Alaska and Apco each owned 7½% of Energy's shares and, with two other companies (owning 3% and 2% each), were part of a joint venture called the Apco Group. A voting trustee held "virtually all of the remaining 80%" of Energy's shares. 402 F. Supp. at 538.

Alaska's tender materials disclosed that its goal was to obtain control over Apco and then—with control of a major-

ity of the joint venture's shares (i.e., 15% of 20%)—to obtain working control of Energy.

Alaska's tender materials *failed* to inform Apco shareholders that control over a majority of the joint venture's shares might not result in Alaska's control over Energy. A voting trustee, holding 80% of Energy's shares, was required to "vote the stock of Energy only as directed by the board of directors of Energy." 402 F. Supp. at 552. A majority of Energy's board (6 of 11 directors) were not representatives of the joint venture group. Legal opinions by Energy's counsel and Apco's counsel rendered prior to the tender fight indicated that the independent majority on Energy's board had the legal right under the voting trust agreement to order the voting trustee to vote to continue their control. It is in this context that Judge Stapleton said:

> ". . . The critical facts for present purposes are that at the time of Alaska's tender (1) the ability of the holder of a majority of the Apco Group's stock to secure working control of Energy turned on substantial and litigable questions, and (2) at least a majority of Energy's present board . . . had acted in a manner which indicated that they would not voluntarily accede to Alaska's control of Energy in the event it acquired Apco's Energy stock. . . .
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> * * *
>
> "[N]owhere is it disclosed in Alaska's tender that *Energy's present board, whose directors the voting trustee was directed to follow by the Voting Trust Agreement,* did not share Alaska's view that control of Apco's Energy shares, 'should, through the vehicle of the voting trust, provide . . . [Alaska] with effective control of Energy as well.'" (402 F. Supp. at 551-52; emphasis in original)

Thus, in *Alaska Interstate*: (i) the crucial facts impeding and possibly entirely preventing Alaska's obtaining control of Energy (i.e., the interpretation of the voting trust agreement adopted by the independent major-

ity of Energy's directors and eminent counsel) were withheld from Apco's shareholders, and (ii) the shareholders had no knowledge of, or way of finding out about, the facts on their own.

Here, the impediments to Host's taking immediate operating control of Armour, i.e., the staggered board and cumulative voting) were: (i) only temporary obstacles, (ii) clearly described in Host's prospectus, (iii) presumably (and constructively) known to Armour shareholders anyway, and (iv) made known to Armour shareholders by means of the contemporaneous proxy statements, letters and other communications that they continually received.

On the basis of a record which permitted no other finding, Judge Weinfeld properly held:

> "Far from being misled, Armour shareholders were thus inundated with information concerning their own corporation's staggered board and its cumulative voting provision. The bombardment of the Armour shareholders by communications and publications hardly suggests that they were misled into believing that General Host would achieve immediate control of Armour's Board of Directors if it obtained more than 50% of Armour shares." (402 F. Supp. at 201)
>
> * * *
>
> "Under all the circumstances then existing, including the acknowledged hostility of Armour management, its mailings to shareholders and its contemporaneous solicitation of proxies for Armour's upcoming shareholder meeting, the prospectus was not materially misleading on the prospect of General Host's eventually acquiring control of Armour after the exchange offer." (402 F. Supp. at 206)

B. The Cash Flow Issue

Plaintiff contends (p. 3) that the prospectus was misleading as to an alleged "Cash Flow Problem" of Host in that the prospectus (a) failed to disclose that Host was relying upon projections to meet its future debt and debt

service obligations, (b) failed to disclose that Host could not meet its future debt and debt service obligations out of internally generated funds, and (c) represented that upon consummation of the exchange offer, without more, Host would be able to control Armour's dividend policy and dispose of Armour's assets to obtain funds to meet its debt requirements. These arguments have no merit.

As to (a), plaintiff agrees that projections should not have been included in the prospectus, and Judge Weinfeld so held:

> ". . . [T]he SEC prohibited the inclusion of earnings projections in a prospectus. Plaintiff concedes that because of this Commission policy, General Host could not disclose its projected earnings." (402 F. Supp. at 195-96)

Glynn testified that although the Host projections were requested by and submitted to the SEC after Armour's counsel questioned Host's ability to meet its debt service requirements (JA 1073, 1076 [Ex. A-21, pp. 3-4, 6]) the SEC did not ask Host to include any statement in the prospectus as to Host's cash flow (JA 481-82, 490-91). Thus Judge Weinfeld found:

> "As early as December 1968, counsel for Armour advised the SEC that in its opinion 'the high debt-equity ratio of General Host (presently between four and five-to-one) raises important questions as to its sources of repayment of its large borrowings,' and urged the Commission to require that the General Host prospectus 'show rather explicitly the projected source of funds to service new indebtedness . . .' . . . Although, as noted above, Armour specifically raised the matter before the SEC, the Commission made no request that General Host make any statement in the prospectus as to its ability to service its debt out of cash flow, either historical or as projected." (402 F. Supp. at 197)

Plaintiff is reduced to contending (p. 37) that the prospectus should have contained a statement that "Host was

relying on future earnings to meet its future expenses, including debt payments." But this would have been a projection which Host could not have made. Moreover, any suggestion that Host was relying *solely* on future earnings would not have been accurate (see discussion of plaintiff's (b) below). And nothing would have been served by inclusion of self-evident language that future obligations are paid out of future funds. Shareholders may be presumed to have a general understanding of the business world.* Judge Weinfeld found no material omission and observed:

> "The prospectus contained no statement as to cash flow that a reasonable investor would rely upon to his detriment. . . ." (402 F. Supp. at 196)

As to plaintiff's (b), Judge Weinfeld, relying on page 9 of the prospectus (JA 823 [A-23, p. 9]), stated:

> "The prospectus does not say that General Host intended to rely on its cash flow to meet its obligations. To the contrary, the prospectus refers to alternative methods by which General Host could raise cash to service debt during the period required to obtain control of Armour.
>
> • • •
>
> "All of these alternative sources of available funds were feasible." (402 F. Supp. 195, 197)

In accord with the prospectus, testimony was given at trial by Glynn and Ashton that Host management considered that, if necessary, it could:

> (1) supplement Host's future cash flow by using Host's existing cash balances** (JA 426-427, 483);

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* See, e.g., Chris-Craft II, 480 F.2d at 366; Symington Wayne Corp. v. Dresser Industries, Inc., 383 F.2d 840, 843 (2d Cir. 1967).

** Bettauer of Price Waterhouse pointed out that Host had $9 million in working capital available (JA 172).

(2) draw on an outstanding bank commitment to lend $6 million to Host (JA 424-25);

(3) borrow new funds with Host's $200 million worth of Armour stock as collateral (JA 483);

(4) sell portions of its own assets which were valued at $81 million by Laird & Company (JA 398, 421, 426, 483-84);

(5) lease assets rather than owning them (JA 484);

(6) reduce its debt by forcing conversion of its five percent debentures into shares of Host (JA 421); and/or

(7) issue new equity securities (JA 424).

Plaintiff offered no evidence whatsoever to show either that these options were not truly considered by Host or that they were not feasible for Host.

Steven Elgart, defendants' expert witness, testified as of January 1969 that "the feeling as reflected both in the Economic Board of the President and the Open Market Policy Committee and a cross section of the forecasts that were available" was that money availability and the cost of money "would become much easier" (JA 507-08). Plaintiff presented no evidence to contradict Mr. Elgart's testimony.

Even though the prospectus did not state that Host would service its debt solely out of its cash flow, Host's management nevertheless did believe its cash flow would be adequate, and the Court so found:

> "The fact was that General Host's internal study dated January 30, 1969, indicated that it would have sufficient cash flow, based on projected earnings and dividends of Armour stock at various levels of ownership, to meet its cash needs for the years 1969 and 1970." (402 F. Supp. at 196; see also testimony of Glynn, at JA 235, 420, 482, 484-85 and 491.)

Plaintiff's contention (c), that Host represented in the prospectus that, upon consummation of the exchange offer it would control Armour's dividend policy and operations, is answered in Point IIA, *supra*, pp. 18-19.

In addition to the adequate disclosure in the prospectus, Armour repeatedly before and during the exchange offer period seized upon the fact that Host was a much smaller company than Armour and shouted that Host would have a "Cash Flow Problem" because giant Armour would be too big for little Host to swallow financially. Judge Weinfeld found that Armour sent letters dated January 9, and February 10, 1969 to its stockholders, which were printed in the Wall Street Journal and The New York Times, alerting Armour's shareholders to this cash flow issue. We do not repeat here the salient points from Armour's letters because Judge Weinfeld quoted them at length. See 402 F. Supp. at 198.

Armour's allegations of a Host "Cash Flow Problem" were also presented before the public and before Judge Weinfeld in 1969 when Armour moved to enjoin the exchange offer (see JA 1108 [Ex. A-42(A)], especially at JA 1108-21, and JA 1130 Ex. A-42(B)). As to this problem, plaintiff's contentions and Host's position are the same on this appeal as the contentions made and positions taken in 1969. Judge Weinfeld denied Armour's motion after hearing the testimony of witnesses (See JA 1307 [Ex. A-42(C)]; *Armour & Co.* v. *General Host Corp.*, 296 F. Supp. 470 (S.D.N.Y. 1969).) Armour did not appeal that determination.

On January 24, 1969, the day after Armour filed its suit seeking to block Host from making an offer for Armour shares, Armour was reported in The New York Times to have stated that the Armour complaint alleged that:

> "it was unlikely that General Host would be able to pay the principal amount and interest on the non-convertible, subordinated $60 principal amount of debentures it proposes to offer Armour stockholders . . ." (JA 1097 [Ex. A-34(1)]).

Accordingly, Judge Weinfeld properly concluded after the trial of this case:

> "General Host did not fail to disclose material facts concerning its ability to meet its future cash needs, and even assuming, *arguendo*, that additional disclosure was needed, the 'total mix' of communications to Armour shareholders rendered any omission in the prospectus harmless." (402 F. Supp. at 198-99.)

C. Communications From Armour Cured Any Alleged Defect in Host's Prospectus.

As described in Points IIA and IIB, *supra*, in addition to Host's prospectus, effective disclosures were made to Armour shareholders through two Armour proxy statements, letters from Armour's management, newspaper advertisements and other direct and indirect communications. Judge Weinfeld framed the issue raised by these curative materials in the following way:

> "The issue presented by this case, therefore, is not, as plaintiff myopically visualizes it, simply whether the General Host prospectus failed to state material facts, but whether Armour security holders were unable to make an informed investment decision because of alleged deficiencies in the propectus, defects which, assuming any are found to exist, were never cured by information contained in other communications to Armour shareholders." (402 F.Supp. at 195).

Judge Weinfeld found that even assuming *arguendo* plaintiff's claims that the prospectus omitted material facts, Armour's communications cured each alleged defect. The record makes clear that the facts concerning each matter about which plaintiff claims he was not adequately apprised were loudly trumpeted to the world. This constituted effective disclosure; it "rendered harmless" any alleged omissions of material facts. *Chris-Craft II*, 480 F.2d at 377; *see, e.g., Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 516 F.2d 172, 179 (2d Cir. 1975) ("Chris-Craft III"); *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 873 (2d Cir.), *cert. denied*, 419 U.S. 883 (1974); *Johnson* v.

Wiggs, 443 F.2d 803, 806 (5th Cir. 1971); *McConnell* v. *Lucht*, 320 F. Supp. 1162, 1164-65 (S.D.N.Y. 1970); I A. Bromberg, *Securities Law: Fraud* § 6.3(1112), at 124.4 (1973).

In *Chris-Craft II*, W.T. Piper, Jr. wrote two letters, dated June 4 and July 25, urging Piper shareholders to accept the exchange offer of Banger Punta Corporation ("BPC"). A third letter from Piper, Jr., dated June 20, disparaged a competing exchange offer by Chris-Craft Industries ("CCI"). "None of the letters explained that, under the terms of a May 8 agreement between BPC and the Piper family, the Piper family might profit handsomely from BPC's acquiring a controlling interest in Piper." 480 F.2d at 365. As to this alleged material misrepresentation or omission, this Court held:

> "Although they [*i.e.*, the June and July letters] omitted any reference to the arrangement between the Piper family and BPC whereby the family might gain a considerable amount of money if BPC were to be successful in gaining control of Piper, *CCI protected itself against injury from such omission by sending letters to all Piper shareholders on June 16 exposing this nondisclosure by the Piper family.* The nature of the Piper family's personal stake in the exchange offer was fully described. *We therefore conclude that this omission was rendered harmless.*" 480 F.2d at 377 (emphasis added).*

In *Missouri Portland Cement Co.* v. *Cargill, Inc.*, *supra*, this Court reiterated that information known to a target company may be taken into account in measuring the adequacy of an offeror's disclosure. Judge Friendly sensibly admonished:

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*Judge Mansfield concurred on this point with Judges Timbers and Gurfein by stating that, in view of CCI's letter of June 16, "no reasonable investor would have accepted BPC's tender offer . . . in reliance upon the Piper family's letters." 480 F.2d at 401. *Chris-Craft III*, 516 F.2d at 179, reaffirmed this *Chris-Craft II* holding.

> "Courts should tread lightly in imposing a duty of self-flagellation on offerors with respect to matters that are known as well, or almost as well, to the target company; some issues concerning a contested tender offer can safely be left for the latter's riposte." (498 F.2d at 873; footnote omitted).

In *Smallwood* v. *Pearl Brewing Co., supra* at 605, the Fifth Circuit properly rejected an argument that "prior disclosure in one communication *will automatically* excuse omissions in another" (emphasis added). The Court emphasized, however, that "previously disclosed facts" *may* be considered in weighing the overall adequacy of disclosure and other sources of available information (*e.g.,* from news papers or a target company) should be taken into account.

In this context, Judge Wisdom stated:

> "Facts may be adequately disclosed by emphasis or repetition in previous correspondence by the same parties or through outside sources . . . [W]e emphasize that the adequacy of disclosure can be measured only by considering the total mix." 489 F.2d at 606.

The cases cited and quoted by plaintiff (pp. 42-43) are wholly consistent with defendants' view of the law. None of them throws the slightest doubt on the validity of Judge Weinfeld's findings that disclosures from Armour rendered the alleged omissions harmless and that the "total mix" of disclosures—*i.e.,* including Host's prospectus, constructive shareholder knowledge and Armour's direct and indirect communications—literally inundated Armour shareholders with the very facts at issue here.

Sonesta International Hotels Corp. v. *Wellington Associates,* 483 F.2d 247, 255 (2d Cir. 1973) and *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 370 F. Supp. 597, 602 (D.N.J.), *aff'd on other grounds,* 497 F.2d 394 (3d Cir. 1974) stand for the proposition that a target company *may,* but *need not,* disclose material information omitted from an offeror's materials. In *Sonesta* this Court observed that it would have "been in the interests of disclosure for Son-

esta itself to have drawn its stockholders' attention" to the offeror's omissions, but found nothing in the Williams Act requiring a target company to do so.*

Plaintiff also quotes from *Kohn* v. *American Metal Climax, Inc.*, 458 F.2d 255, 265 (3d Cir.), *cert. denied*, 409 U.S. 874 (1972).** In *Kohn* the Third Circuit found a number of material misrepresentations and omissions in defendant RST's proxy materials.***

Defendants claimed that the misstatements and omissions of material facts were cured by a "one page letter" (322 F. Supp. at 1343) which was prepared by plaintiff Kohn, a

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* Thus cases taking cognizance of curative material do not encourage misstatements or omissions. An offeror failing to disclose material facts in an exchange offer opens itself to administrative review by the SEC, to a target company's corrective material (which would undoubtedly be put in a most embarrassing way), and to legal actions brought by the SEC, a security holder, and/or a target company (which has the alternative not to correct) in federal district court.

** The rationale for plaintiff's quotation (p. 42) from Titan Group, Inc. v. Faggen, 513 F.2d 234, 239 (2d Cir. 1975) is not readily apparent. Judge Weinfeld properly cited the case to support his conclusion that the fact the prospectus was addressed to Armour shareholders "affects the extent of disclosure required of General Host concerning publicly available information about Armour." (402 F. Supp. at 200). Presumably plaintiff quotes the Titan Group opinion because it cites two cases on which he relied below: Metro-Goldwyn-Mayer, Inc. v. Ross, 509 F.2d 930 (2d Cir. 1975) and Stier v. Smith, 473 F.2d 1205 (5th Cir. 1973). In Metro-Goldwyn-Mayer, Inc. v. Ross, *supra* at 933, this Court held an omission was material because, as opposed to providing adequate disclosure, a defendant-insider's duty was "not discharged merely by giving the purchaser access to company records and letting him piece together the material facts if he can." Similarly, in Stier v. Smith, *supra* at 1208, the Fifth Circuit sensibly held:

> "We should always be wary of holding that a purchaser of securities, who deals with the corporate insider, could have found out omitted material facts by examining the corporate books or undertaking other extensive investigations. To do so is to allow the insider to present prospective purchasers with a mountain of information which they cannot possibly digest . . ."

These decisions involving "inadequate disclosure" by insiders only accentuate just how abundant the mix of disclosures was here.

*** Among these were the following:

(a) The materials created the impression that an amalgamation between AMAX and RST "was an inevitable consequence

dissident shareholder, and included in the proxy materials sent to shareholders. But the Court suggested that Kohn's letter was, at best, a partial palliative and not a real cure. *"Of decisive importance,"* the Court held, was the fact that:

> "... Kohn's letter set forth his attack on the fairness of the amalgamation. *He did not purport to set forth the other material misrepresentations in the proxy statement.*" (458 F.2d at 265; emphasis added)

These other material misrepresentations (*e.g.*, as to the independent survey by RST's banking advisers and the relationship between "nationalization and amalgamation") "may have influenced the stockholder vote regardless of the fairness of the amalgamation." 458 F.2d at 270.

In stark contrast to *Kohn*, Judge Weinfeld found that Armour's ripostes were all-encompassing (as to the issues presented herein) and clear. As Points IIA and IIB, *supra*, demonstrate, this finding was fully supported by the record.

POINT III

Plaintiff's Burden Was to Prove a "Willful, Deliberate or Reckless Disregard for the Truth," But He Failed to Show Even a Lack of Reasonable Care.

Even if Judge Weinfeld had found an inadequate disclosure of material facts, plaintiff's case would nevertheless have been dismissed because this Circuit requires a "willful, deliberate or reckless disregard for the truth" before

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of Zambian nationalization" when, in fact, "amalgamation and nationalization were independent." *Id.* at 262-63.

(b) There was "inadequate disclosure of the unique benefits AMAX was to obtain incident to the Amalgamation." *Id.* at 265.

(c) There was a "failure to disclose that RST's banking advisers did not make an independent survey of RST's assets." *Id.* at 268.

civil liability may be imposed.* There is not a hint of such conduct in this record.

Plaintiff claims (p. 57) that he "established the element of scienter" when he demonstrated that defendants were "aware of both the Control and Cash Flow Problems."

But plaintiff badly misses the point when he equates "awareness" of the "control" and "cash flow" issues with a willful or reckless disregard for the truth. He argues that a defendant should be held liable merely because he *knows of* the existence of *an issue* as to which disclosure must be made, whereas the cases require that a defendant *know* (or be recklessly indifferent to the fact) that the *issue was inadequately disclosed* before courts will find a breach of law. At the time of the exchange offer the matters that plaintiff claims were not highlighted enough in Host's prospectus were known not only to defendants but also to Armour, Greyhound, and the SEC. Any assertion that material facts were *intentionally* withheld cannot withstand analysis in a context where Armour, with all of the facts in hand, stood ready to pounce on any deviation from the truth.

Thus, as opposed to the usual Section 10(b) or 14(e) case involving an intentional withholding of material information, we are dealing with a claim that defendants, acting in good faith, failed in judging *where* and *how* to set forth the facts.

What plaintiff had to prove, therefore, was not that defendants were aware of, for example, the staggered board and cumulative voting, but that they acted with a wholly unreasonable exercise of judgment—"a reckless disregard for truth"—by setting forth the facts as to these matters on pages A-9 and A-10 of the prospectus instead of

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* See e.g., Chris-Craft III, 516 F.2d at 194 n. 30; Lanza v. Drexel & Co., 479 F.2d 1277, 1306 (2d Cir. 1973); Chris-Craft II, 480 F.2d at 362-63; Cohen v. Franchard Corp., 478 F.2d 115, 123 (2d Cir. 1973); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1096 (2d Cir. 1972); Shemtob v. Shearson Hammill & Co., 448 F.2d 442, 445 (2d Cir. 1971).

page 1. No verbal sleight of hand should be permitted to obscure plaintiff's bur[illegible]

Judge Weinfeld, it is clear, saw no merit in plaintiff's *scienter* claim. In finding that Host's prospectus was free of material omissions and misstatements (402 F. Supp. 205-06) he in effect found that defendants disclosed with reasonable discretion and care. For plaintiff to meet his burden of showing *scienter*, he would necessarily have to prove that defendants acted with a wholly unreasonable exercise of judgment in determining that the prospectus adequately disclosed the truth.

Judge Friendly's famous concurrence in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.[illegible] 833, 866-68 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (19[illegible], sets forth the philosophical underpinnings of this Circuit's position on *scienter*. Judge Friendly in dealing with the issues of judgment involved there observed:

> "I find it equally plain, as Judge Wa[illegible]rman's opinion convincingly demonstrates, that *the release did not properly convey the information in the hands of the draftsmen on April 12* . . . ."
>
> "[I]t is . . . [however] clear that the April 12 press release would be the worst possible case for the award of damages for *merely negligent misstatement, as distinguished from the kind of recklessness that is equivalent to wilful fraud*. . . ." (Emphasis added)

Judge Friendly concluded that a negligence standard would hinder disclosure by encouraging silence and would create uncalled for harshness (*i.e*, "large judgments, payable in the last analysis by innocent investors") by punishing

> "a slip of the pen or failure properly to amass or weigh the facts—all judged in the bright gleam of hindsight. . . ."

The record precludes any finding other than that defendants acted with reasonable care (See pages 23-24, 32-33,

supra). Plaintiff has not shown that the judgments made by Host's management* and its acountants and lawyers, and by Allen Inc., were other than careful and prudent. The chasm between what plaintiff has proven and his manifest burden of showing a "reckless disregard for the truth" mandates a finding for defendants here.

POINT IV

The Trial Court Properly Found for Allen Inc. on the Merits; There Is No Basis For Challenging the Dismissal of Allen Co. from this Case.

A. Allen Inc. Fulfilled All Duties to Which It May be Held.

Citing *Chris-Craft II, supra,* and *Sanders* v. *John Nuveen & Co.,* 524 F.2d 1064 (7th Cir. 1975), plaintiff (p. 61 n. 28) concludes as to Allen Inc. that "there was a complete abdication of the underwriter's duty."

But Allen Inc. respectfully submits that neither *Chris-Craft II* nor *Sanders* can be used to impose underwriter duties or liabilities on Allen Inc.

In *Chris-Craft II,* First Boston, the "underwriter," had issued a crucial "opinion letter" which valued "BPC securities at not less than $80 per Piper share" without disclosing that the Bangor and Aroostook Railroad, a major asset of BPC, was about to be sold for "5 million, which was $13.5 million less than the amount at which it was carried on the books." 480 F.2d at 354, 369. The Court, stressing that an underwriter can be held to an affirmative duty be-

* Plaintiff's (p. 58) suggestion that negative inferences should be drawn against defendants who were not called as witnesses has no merit. No negative inference may be drawn from a party's failure to testify where plaintiff has failed to advance any evidence requiring rebuttal. *United States* v. *Roberson,* 233 F.2d 517, 519 (5th Cir. 1956); *Stratchborneo* v. *Arc Music Corp.,* 357 F. Supp. 1393, 1404 (S.D.N.Y. 1973). Plaintiff's point is particularly unfounded with respect to defendant Pistell since plaintiff had designated him as a plaintiff's witness, made arrangements to have him available without subpoena, and then failed to call him.

cause of its "financial stake in the issue" and the concomitant public reliance on its "incentive" to verify published materials, found that:

> "First Boston's certification of the BPC registration statement carrying the BAR at $18.4 million amounted to an almost complete abdication of its responsibility to potential investors. . . ." 480 F.2d at 370, 373.

In *Sanders* the district court found that Nuveen was an underwriter of WH commercial paper because it had purchased the commercial paper from WH and resold it to its clients. But Allen Inc. neither purchased nor sold Host's securities. Its responsibilities were those set forth in the prospectus, namely, to solicit tenders of securities by Armour shareholders and their brokers (JA 825).

Allen Inc. submits that the record overwhelmingly demonstrates that Allen Inc., as a dealer-manager and not underwriter, did everything that it could be expected to do.

B. Allen Co. Had No Role in the Exchange Offer and Cannot be Held Liable Under Any Theory Involving "Alter Ego" or "Control."

At the conclusion of the trial, the Court granted the motion of Allen Co. to dismiss the Complaint as to it (JA 525). In granting such motion, the Court engaged in the following colloquy with plaintiff's counsel:

> "THE COURT:
> "Mr. Weiss, other than the letter which was written by Allen & Company, . . ., what other evidence is there in the case as far as Allen & Company's participation is concerned?
> "MR. WEISS: Your Honor, the only other evidence we put in is the stipulated facts.
> "THE COURT: All right. The motion made on behalf of Allen & Company is granted."

Plaintiff now proposes for the first time a number of novel legal theories to impose liability on Allen Co.

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It would be improper for an appeals court to impose liability pursuant to a legal theory to which the opposite party had no opportunity to present a defense before the trial court. See *Fountain* v. *Filson,* 336 U.S. 681, 683 (1949). But even if this Court were to consider the merits of plaintiff's new theories, the facts in no way support plaintiff's arguments.

The Stipulated Facts show:

> Allen Inc. has been in existence since 1964 (Stip. 2, JA 649).
>
> Allen Inc. was organized with an initial capitalization of $1,000,000. The stock was subscribed for by about 40 persons (Stip. 3, JA 650).
>
> Subsequent to the formation of Allen Inc. in 1964 and during all relevant times, it was the function of Allen Inc., among other things, to act as underwriters, investment bankers, dealer-managers and merger specialists. Allen Co. acted as over-the-counter traders, traders in the third market and municipal and government bond traders (Stip. 4, JA 651).
>
> During all relevant periods, Allen Inc. had approximately 45 officers (Stip. 8, JA 652).
>
> Allen Co. is authorized to do business only in the States of New York and New Jersey. Allen Inc. is authorized to do business in approximately 40 states (Stip. 10, JA 652).
>
> Allen Inc. and Allen Co. each file separately all reports with the SEC and the NASD (Stip. 13, JA 653).

We can find no case that has ever "pierced the corporate veil" to impose liability on such facts. *See, e.g., Zubik* v. *Zubik,* 384 F.2d 267, 270-74 (3d Cir. 1967); *Berkey* v. *Third Ave. Ry. Co.,* 244 N.Y. 84, 87-95, 155 N.E. 58 (1926); W. Cary, *Cases and Materials on Corporations* 109-49 (4th ed. 1969).

The only case cited by plaintiff in support of "piercing the corporate veil" is *Bangor Punta Operations, Inc.* v. *Bangor & Aroostoock R.R.,* 417 U.S. 703 (1974), a deci-

sion involving special facts and the issue of standing to sue, which is simply not on point. 417 U.S. at 713.

Plaintiff also argues that the similarity of names between "Allen & *Company*" and "Allen & Company *Incorporated*" is inherently deceptive. The word "Incorporated" fairly and properly distinguishes the two firms. A reading of the Wall Street Journal shows that it is common practice for investment firms, doing specialized work of one type or another, to use closely related names.*

Finally, plaintiff argues for the liability of Allen Co. for any act of Allen Inc. based upon Section 20(a) of the Exchange Act, which provides that controlling persons are liable for the acts of controlled persons unless the controlling persons "acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action." There is no suggestion in the stipulated facts or in the record at trial that Allen & Co. controlled Allen Inc.

Furthermore, both the stipulated facts and the record clearly show that Allen Co. "did not directly or indirectly induce" any act of Allen Inc. According to the Stipulated Facts:

> "During all relevant periods all transactions as dealer managers in connection with any exchange offer were performed by Allen Inc. and Allen Inc. received full compensation for all such services" (Stip. 11, JA 652).
>
> "Allen Inc. was a dealer manager in connection with the exchange offer of General Host for securities of Armour and received all compensation paid by General Host as a dealer manager as aforesaid. Certain solicitor dealer checks were made out to Allen Co., and were paid over by Allen Co. to Allen Inc." (Stip. 12, JA 652).

* In support, plaintiff cites only an SEC "no action" letter prohibiting a broker dealer operating a branch office under the designation of a "division of" that broker dealer (BWA, Inc., (SEC 1972), CCH Fed. Sec. L. Rep. ¶ 79,000). However, plaintiff has disregarded a series of "no action" letters permitting a broker dealer to continue to use a broker dealer's name after its acquisition by another broker dealer, using a divisional designation. *See e.g., Fred Alger & Company, Inc.,* (SEC 1973), CCH Fed. Sec. L. Rep. ¶ 79,651.

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UNITED STATES COURT OF APPEALS
for the Second Circuit

Docket #75-7538

Alan L. Spielman,

Plaintiff-Appellant,

-against-

General Host Corporation, Richard C. Pistell, Harris J. Ashton, C. Whitcomb Alden, Jr., et al

Defendants,

General Host Corporation, Richard C. Pistell, Harris J. Ashton, C. Whitcomb Alden, Jr., et al

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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State of New York,)
) ss:
County of New York)

Sol Saginaw, being duly sworn, deposes and says that he is over the age of 21 years and resides at 1641 Third Avenue, New York, N. Y. 10028.

That on the 30th day of January 1976 at 4:30 p.m. he served the annexed BRIEF FOR DEFENDANTS-APPELLEES on the following party: (2 copies)

Messrs. Milberg & Weiss
1 Pennsylvania Plaza - 25th Floor
New York, N. Y.
Attn: Jared Spechrie or Mel Weiss

in this action, by delivering to and leaving said copies at that office.

Deponent is not a party to the action.

Sol Saginaw

Sworn to before me this
30th day of January 1976

Michael J. Hoops

MICHAEL J. HOOPS
Notary Public, State of New York
No. 30-4503056
Qualified in Nassau County
Commission Expires March 30, 1977